STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2003
v	No. 237028 Wayne Circuit Court
GERALD WEBB, Defendant-Appellant.	LC No. 00-013187-01

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendant was originally charged with first-degree felony murder, MCL 750.316, conspiracy to commit armed robbery, MCL 750.157a, and armed robbery, MCL 750.529. He now appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, conspiracy to commit armed robbery, MCL 750.157a, and unarmed robbery, MCL 750.530. Defendant was sentenced to concurrent terms of seventeen to forty years' imprisonment for the second-degree murder conviction, five to forty years' imprisonment for the conspiracy to commit armed robbery, and five to fifteen years' imprisonment for the unarmed robbery conviction. We affirm.

I. Basic Facts and Procedural History

This case arises out of the shooting death of the victim, Ronald Lasure. Morgan Jones shot Lasure on the evening of October 17, 2000. On that date, Lasure arrived at a drug house located at 8515 Strathmoor, collected the mail, and spoke to the occupants at the house. While walking to his car after leaving the house, Jones approached Lasure, pointed a .38 caliber handgun at him, and demanded money and his keys. Lasure removed money from his pocket and threw it to the ground. As Jones was picking the money up, Lasure struggled with Jones for the gun. Jones retained control of the gun just as Markeith Howard arrived in his car. Lasure ran to Howard's car followed by Jones. Jones attempted to shoot Lasure, but the weapon failed to discharge. Howard told Jones to leave. As Jones walked back to the house, Lasure went around and entered his truck. Jones turned back and shot two times at Lasure's truck, shattering the driver's window. Lasure started the truck and drove away, but was later found on the next street on the ground next to his truck, which had collided with a tree. Lasure died of a single gunshot wound to his neck.

Lasure sold drugs out of the house with defendant, Jones, Frederick Abbott, and a person named Patrick. On the afternoon of the shooting, Abbott was at the drug house and overheard a conversation between defendant and Jones regarding Lasure. According to Abbott, defendant told Jones that Lasure had two or three thousand dollars on him, and defendant and Jones wanted to get it. However, defendant stated that he could not rob Lasure because defendant and Lasure knew each other, but that Jones could rob Lasure because the two were not acquainted. Defendant was holding a .38 caliber handgun at the time of the conversation.[1] At some point Abbott left the house, but returned later that evening and found defendant and Jones still present at the house. Defendant and Jones made various phone calls attempting to locate Lasure. When the shooting occurred, defendant was seen standing by the side of the house.

On November 4, 2000, defendant was arrested and interviewed by Detroit Police. During the interview, defendant stated that he, Jones, Abbott, and Patrick were sitting around drinking and Jones started talking about robbing someone. Apparently they had seen Lasure with three or four thousand dollars earlier that day and defendant stated that that money "would put me on my feet." Defendant admitted that he "geeked" Jones to rob Lasure, but did not believe Jones would do it. Defendant placed a telephone call to Lasure and instructed his girlfriend to place a telephone call to Lasure, seeking to have Lasure come to the Strathmoor house to deliver narcotics. According to defendant Lasure eventually arrived, provided the narcotics and left the house followed by defendant. Defendant further stated that Jones then ran out of the house, pointed the gun at Lasure, and demanded Lasure's money and keys. Lasure threw his money on the ground and struggled with Jones for the gun. Defendant indicated that Lasure then ran to Howard's car, and Jones attempted to shoot Lasure, but the gun did not fire. Lasure ran to his truck, and Jones shot at the truck. Defendant claimed that he remained by the side of the house during the shooting.

Defendant was charged with first-degree felony murder, conspiracy to commit armed robbery, and armed robbery. Following a jury trial, he was convicted of the lesser offenses of second-degree murder and unarmed robbery, but convicted as charged for conspiracy to commit armed robbery. Defendant appeals as of right, and we affirm.

II. Sufficiency of the Evidence Claims

Defendant argues that there was insufficient evidence to support his convictions. We disagree. In reviewing a claim that insufficient evidence was presented to support a conviction, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each essential element of the crime was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citations omitted). Circumstantial evidence and any reasonable inferences arising from that evidence may constitute satisfactory proof of the elements of a crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), quoting *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

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[1] Another witness testified that he had seen defendant earlier in the week in possession of a .38 caliber handgun.

A.

First, defendant argues that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that defendant was guilty of second-degree murder. Defendant was charged with first-degree felony murder in the death of Lasure based on his role in aiding and abetting Jones in the robbery of Lasure. Defendant argues that because he was acquitted of the first-degree felony murder charge, he cannot be held liable for the death of Lasure on the theory that he aided and abetted the robbery, unless it was proven beyond a reasonable doubt that he aided and abetted the murder itself.

To the contrary, although defendant was acquitted of aiding and abetting first-degree felony murder, the evidence may still be sufficient to support a conviction of second-degree murder. See *People v Feldmann*, 181 Mich App 523, 535-537; 449 NW2d 692 (1989) (although the trial court acquitted the defendant of first-degree felony murder, evidence of requisite malice was sufficient to support a conviction of second-degree murder). Second-degree murder is a lesser-included offense of first-degree murder. *Id.* at 536-537. To support a conviction of second-degree murder, the prosecution must prove that "defendant caused the death of the victim and that the killing was done with malice and without justification or excuse." *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991). "Malice" is the required mental state for second-degree murder and is defined as the intent to kill, the intent to do great bodily harm, or the wanton or willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm. *Id.*; *Feldman, supra* at 534. "Malice may be inferred from the facts and circumstances of the killing," *Harris, supra*, and from evidence that "the defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).

As it pertains to aiding and abetting, "[a] person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *Id.* at 495-496 (citations omitted). "Aiding and abetting" describes all forms of assistance made available to the perpetrator of a crime and includes all words or actions that might support, encourage, or incite the commission of a crime. *Carines, supra* at 757 (citations omitted). The requisite intent is that necessary to be convicted as a principal. *Feldman, supra* at 535, quoting *People v Kelly*, 423 Mich 261, 278-279; 378 NW2d 365 (1985). Thus, in this case, it must be shown that defendant had the intent to kill, the intent to do great bodily harm, or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm. See *id.* at 535-536.

Here, there was sufficient evidence for a jury to conclude that defendant participated with Jones in the armed robbery of Lasure. Defendant encouraged and incited Jones to rob Lasure, while in possession of the same type of gun that was used to rob and kill Lasure. *Carines, supra*. Thus, it may be inferred that defendant provided Jones with the weapon used to commit the robbery and kill Lasure. Indeed, defendant told Jones that Lasure had two or three thousand dollars on him, and that he could not rob Lasure because defendant and Lasure knew each other,

but that Jones could rob Lasure because Lasure did not know Jones. Further, defendant made several calls to Lasure in order to locate him. By encouraging and inciting an armed robbery, defendant set in motion a force likely to cause death or great bodily harm. *Carines, supra* at 760. Although defendant did not necessarily know that Jones was planning on shooting Lasure, both Jones and defendant acted with a willful and wanton disregard of the likelihood that their behavior would cause death or great bodily harm. *Harris, supra*; *Feldman, supra.* The use of a gun to commit the robbery is sufficient to infer malice. *Carines, supra* at 759. Therefore, when viewing the evidence in a light most favorable to the prosecution, the prosecution presented sufficient evidence to support defendant's second-degree murder conviction as an aider and abettor. *Johnson, supra*.

B.

Defendant next argues that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that defendant was guilty of unarmed robbery or conspiracy to commit armed robbery. Similarly, the prosecution relied on an aiding and abetting theory to support defendant's conviction of the lesser-included offense of unarmed robbery. The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). Again, "[t]o support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *Izarraras-Placante, supra*.

At the same time, the offense of conspiracy requires proof of an unlawful agreement between two or more persons with a specific intent to combine with others to accomplish an illegal objective. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). To prove the intent to combine with others for an unlawful purpose, it must be shown that the intent, including knowledge, was possessed by more than one person, since there can be no conspiracy without two or more persons. *Id.* at 481-482. Further, the defendant must have knowledge of the conspiracy, the objective of the conspiracy, and intend to participate cooperatively to further that objective. *Id.* at 484.

Viewed in the light most favorable to the prosecution, the evidence in this case was sufficient for the jury to find all the essential elements of unarmed robbery and conspiracy to commit armed robbery proven beyond a reasonable doubt. *Johnson, supra*, 460 Mich at 723. The evidence shows that defendant and Jones conspired to rob Lasure. Defendant incited and encouraged Jones to commit the robbery and it may be inferred that defendant provided Jones with the gun used to rob and kill Lasure. Other evidence established that after encouraging Jones to rob Lasure, defendant placed phone calls to Lasure's house in order to locate him and lure him over to the house on Strathmoor. When Lasure arrived at the house, Jones proceeded to take Lasure's money while pointing a weapon at him. Interestingly, we find that this evidence was sufficient to convict defendant of the charged offense of armed robbery. *Carines, supra*. However, for whatever reasons, the jury returned a verdict on the lesser-included offense of unarmed robbery.

We note that the crux of defendant's argument regarding this issue focuses on the credibility or lack thereof of the prosecution's witnesses. However, it is well established that questions of credibility are left to the trier of fact and this Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

III. Compromise Verdict Claim

Next, defendant argues that he was denied a fair trial because the jury was improperly instructed on the charge of felony murder even though it was unsupported by legally sufficient evidence, resulting in an improper compromise verdict. We disagree. However, even accepting defendant's argument that the trial court erred in instructing the jury on the charge of first-degree felony murder, we hold such error harmless because it is highly probable that any alleged error did not affect the verdict. *People v Graves*, 458 Mich 476, 482-483; 581 NW2d 229 (1998) (rule of automatic reversal in such cases rejected in favor of "highly probable test"). The second-degree murder charge was properly submitted to the jury, and as previously discussed, there was sufficient evidence presented to find defendant guilty of second-degree murder beyond a reasonable doubt. Accordingly, contrary to defendant's assertion, any alleged error in this regard does not require reversal of defendant's conviction.[2] See *id.* at 487 (submission of first-degree murder charge harmless where second-degree murder was properly submitted to the jury, and the defendant was acquitted in favor of still lesser charge of voluntary manslaughter).

IV. Ineffective Assistance of Counsel Claims

Defendant also argues that he was denied the effective assistance of counsel based on three alleged errors. We disagree. Because there was no *Ginther*[3] hearing in this case, our review of this issue is limited to errors apparent on the existing record. *Avant, supra* at 507.

In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-

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[2] Significantly, even defendant concedes in his brief on appeal that the trial court should have "submitted the case to the jury *on no more than second-degree murder*." (Emphasis added.) Thus, we find no error requiring reversal.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

445; 597 NW2d 843 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445.

A.

Defendant first argues that he was denied the effective assistance of counsel when his trial counsel withdrew his request for the entire standard criminal jury instruction 10.4 regarding the scope of a criminal conspiracy and instead agreed to only paragraph four.[4] Defendant's argument is without merit. First, the second and third paragraphs of defendant's proposed instruction are not applicable to this case or supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Second, defendant has failed to establish that he was so prejudiced by the alleged error that, but for the error, the result of the proceedings would have been different. *Noble, supra*. A defendant is criminally responsible for the acts of his associates if those acts are within the scope of the unlawful agreement or might fairly have been foreseen to happen as a result of the actions agreed on by the participants. *Carines, supra* at 759 (citations omitted). Here, as previously discussed, defendant participated in a robbery involving the use of a gun, acting in wanton and willful disregard of the possibility that death or great bodily harm would result. See *id.* at 760. Thus, even had the jury been instructed on the first three paragraphs of CJI2d 10.4, we are not persuaded that the result of the proceedings would have been different. *Noble, supra*.

B.

Second, defendant argues that his trial counsel was ineffective in failing to raise the defense of double jeopardy when defendant was tried for three crimes arising from a single incident. "The double jeopardy guarantee protects against successive prosecutions for the same offense and protects against multiple punishments for the same offense." *People v Harding*, 443 Mich 693, 699; 506 NW2d 482 (1993). Defendant appears to be arguing that by trying him for

[4] Criminal Jury Instruction 10.4 reads as follows:

> (1) The defendant is not responsible for the acts of other members of the conspiracy unless those acts are part of the agreement or further the purposes of the agreement.
>
> (2) If the defendant agreed to commit a completely different crime, then [he/she] is not guilty of conspiracy to commit _____.
>
> (3) A person who joins a conspiracy after it has already been formed is only responsible for what [he/she] agreed to when joining, not for any agreement made by the conspiracy before [he/she] joined. [You may consider evidence of what other members of the alleged conspiracy did or said before the defendant became a member, but only in order to determine the nature and purpose of the conspiracy after the defendant joined.]
>
> (4) Members of a conspiracy are not responsible for what other members do or say after the conspiracy ends. [CJI2d 10.4.]

felony murder and the underlying offenses of armed robbery and conspiracy to commit armed robbery his double jeopardy protections were violated and defense counsel's failure to raise double jeopardy as a defense resulted in the ineffective assistance of counsel. Defendant's reliance on the double jeopardy provisions of the United States and Michigan Constitutions is misplaced. Defendant was charged with first-degree felony murder, armed robbery, and conspiracy to commit armed robbery. Had defendant been convicted of both felony murder and armed robbery, or felony murder and the lesser-included offense of unarmed robbery, he could not have been sentenced for both convictions. Instead, defendant would have been sentenced on the higher charge and the lower conviction would have been vacated as felony murder is an enhanced sentence for what would otherwise be second-degree murder. *Id.* at 711-712, 714. However, defendant was convicted of second-degree murder, conspiracy to commit armed robbery, and unarmed robbery. Accordingly, the double jeopardy provisions were not implicated, and defendant's trial counsel was not ineffective in failing to raise such a defense. Defense counsel is not required to advocate a meritless position. *People v Snider,* 239 Mich App 393, 425; 608 NW2d 502 (2000).

C.

Last, defendant argues that he was denied the effective assistance of counsel when his trial counsel failed to challenge the lack of evidence of malice on the motion for a directed verdict of the murder charge. Because we previously concluded that the prosecution presented sufficient evidence of malice for the jury to convict defendant of second-degree murder, defendant's counsel was not ineffective in failing to challenge that specific element during the motion for directed verdict. *Noble, supra*.

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Christopher M. Murray